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IN THE
Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ's primary purpose is to advocate for fairness and balance in proposed changes to the Federal Rules of Civil Procedure ("FRCP") through the Rules Enabling Act process. Since its founding in 1987, LCJ has become a leading voice on FRCP reform, most recently providing insight into the debate over proportionality in Rule 26 and sanctions for failure to preserve electronically stored information in Rule 37(e), both related to the amendments this Court recently adopted. LCJ has filed written comments related to the Advisory Committee's current work to develop potential amendments to Rule 23.

Respondent has urged the Court to defer to the Rules Enabling Act process rather than to decide whether the effect of an offer of complete relief is different when the plaintiff has a asserted a claim under Rule 23 but a class has not been certified.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both parties here filed blanket consents to amicus briefs, which are reflected in the docket of this case.

LCJ has specific expertise in the FRCP and the rulemaking process, drawing on both its own policymaking efforts and the collective experience of its members in litigating the FRCP as written. Accordingly, LCJ writes as *amicus curiae* to offer this Court a unique perspective on whether the question of allowing an offer of relief to the named plaintiff to moot a class action complaint is more appropriately addressed by the Court in its role as an Article III court, or in its legislative role as delegated to the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee) and its Advisory Committee on Civil Rules. LCJ's experience with the rulemaking process during previous attempts to reform Rules 23 and 68 gives it an essential perspective on the current debate over the interaction of these two Rules.

Given this extensive experience with the FRCP, LCJ has a strong interest in seeing the Court reverse the decision below, which rests on the fallacious assumption that a designation of a complaint as a class action somehow changes the operation of the other Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT

This case continues an important debate about the character of Rule 23 class actions, namely: are they an advanced joinder device, or something more transformative that should be governed by different rules than other cases in federal court? If it is merely a joinder device, then using the words "class action" in the complaint changes nothing about the litigation until a class is properly certified. If it is something

more than that, then courts are justified in treating even putative class actions as entities that require special protection before certification. Based on the dictates of Article III of the Constitution, the Rules Enabling Act, and the FRCP themselves, LCJ respectfully submits that, until a class is certified, a class action lawsuit is no different from an individual lawsuit.

As a result, the Court need not and should not defer to the Rules Enabling Act process to decide whether, in an asserted class action but prior to class certification, an unaccepted offer that fully satisfies plaintiff's claim renders the claim moot. Although the Rules Enabling Act process carries real benefits to litigation, the Court, not the Advisory Committee on Civil Rules, is charged with resolving live controversies over interpretation of the FRCP as written. The Rules Enabling Act does not grant authority to change or define constitutional or substantive rights such as the definition of mootness. Moreover, the rulemaking process is designed to move at a cautious pace, consider multiple proposals as well as extensive public comment, and achieve consensus over any rules reform. While this is an important and effective process, it is ill-suited for deciding substantive rights or individual cases.

Based on these same principles, it is also clear that the Court should not ignore Rule 68 as written in order to protect certain pre-certification class actions. The FRCP are designed to apply in *all* lawsuits, and they do not change simply because a case has been designated a "class action" in the complaint's caption. The Ninth Circuit's holding

below relies on the fact that the lawsuit at issue is a class action, but never explains why the certification process under Rule 23—which was not yet invoked—should render the logic of mootness irrelevant in this case. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014). In doing so, it necessarily privileges class actions over other forms of litigation.

Finally, this Court should not look to the "conceptual sketches" released by the Rule 23 Subcommittee as persuasive authority in this case. They are deliberately provocative, and push the boundaries of what is allowed under the Constitution and the Rules Enabling Act as a means of promoting discussion of possible Rule 23 reforms.

ARGUMENT

1. The Court should rule on the question of mootness rather than deferring to the rulemaking process.

In opposing certiorari, Respondent has argued that the "rulemaking process is likely to be an effective way of ensuring uniformity of practice among circuits." Respondent's Supp. Br. at 2. He has also argued that, to the extent that Petitioner advanced "policy considerations" as a basis for "allowing defendants to avoid class actions through pick-off offers to individual plaintiffs ., the rulemaking process is likely to be a superior way of considering and resolving the competing policy arguments that bear on the question." *Id.*

This argument evinces a clear misunderstanding of the proper scope and role of the rulemaking process. Rulemaking is a consensus mechanism, used to enact changes that are agreeable to a wide number of litigants. It is not generally a means used to resolve live disputes over fundamental Article III principles or interpretation of the FRCP Moreover, rulemaking has traditionally been trans-substantive; the FRCP remain the same regardless of the size or subject matter of the case.

The Rules Enabling Act authorizes the judicial branch to craft procedural rules:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. *Such rules shall not abridge, enlarge or modify any substantive right.*
>
> 28 U.S.C. § 2072(a)-(b) (emphasis added).

The full rulemaking process is not reflected in the statute, however. In practice, the Court delegates much of its responsibility to the Standing Committee, which itself delegates the discussion and formulation of possible rules to its five advisory committees, which in turn rely upon various subcommittees. As this Court's website explains:

If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment. Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee. The Standing Committee independently reviews the findings of the advisory committees and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules.

How the Rulemaking Process Works,
http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works
(last viewed Jul. 22, 2015)

In other words, there are multiple steps to any proposed change to the rules. They must pass through an advisory committee, the Standing Committee, the Judicial Conference, and then this Court and Congress. 28 U.S.C. § 2073(b); *see also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, & Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999) (describing process).

Former Advisory Committee members ("alumni," as they call themselves) have stressed that the Rules

process is driven by consensus. *See, e.g.*, Lee H. Rosenthal and John L. Carroll, *Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. 135, 138 (2004) ("So I guess the thesis of all this is the Rules process is really consensus, and if you don't have a consensus, there is really no point in jumping into the Rules process as a vehicle for change."); Bone, *The Process of Making Process*, 87 GEO. L.J. at 916 (Advisory Committee "relies on consensus to resolve normative conflict"). If a proposal is likely to be controversial, it will not survive the Rules promulgation process. *See The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. at 137 (rulemaking process culminating in 1998 amendments involved "the drafting of some very, very interesting and innovative rules, which after the wide-open process was ended resulted only in the promulgation of the Rule authorizing interlocutory appeals in class actions").

Similarly, the alumni also stress that transparency is a priority in the rulemaking process. *Id.* at 136 (process is "deliberately transparent"); Bone, *The Process of Making Process*, 87 GEO. L.J. at 903 (describing changes made to Rules Enabling Act to enable "broad public participation by requiring public hearings, open meetings, publicly available minutes, and longer periods for public commentary"); *see also* 28 U.S.C. § 2073(c)-(d) (providing for open meetings of committee and requiring notice to public). These transparency provisions necessarily add further time and layers to the rulemaking process.

These emphases on consensus and transparency are vital to the advisory committee's proper function. Because it wields a quasi-legislative power, the advisory committees correctly do everything they can to ensure that the thinking about various procedural rules is clear to all, and that no minority need worry about a rival special interest railroading procedural changes through the process. The process of changing the FRCP is rightly slow and deliberate. *The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. at 136 (process "is deliberately slow, it deliberately goes through a lot of layers after opportunity for comment from a lot of sources"). But because it is slow and deliberate, the Advisory Committee on Civil Rules ("Advisory Committee") is not equipped to decide live controversies over how to interpret the FRCP as written.

Moreover, because it relies so heavily on consensus, the Advisory Committee is particularly ill-suited to decide controversial matters like the proper role of Rule 68 as drafted. The Advisory Committee itself noted this difficulty in its May 2, 2015, report to the Standing Committee, which detailed two aborted attempts to amend Rule 68: a withdrawn attempt in 1983-84, and a stillborn attempt in the early 1990s. *See* Hon. David G. Campbell, *Report of the Advisory Committee on Civil Rules*, May 2, 2015, at 19. Both of these attempts failed because of the levels of controversy they generated among various practitioners.

Nor is there any guarantee that the Advisory Committee would actually address Rule 68 in its next set of amendments. While the Respondents cited to a

proposed amendment to Rule 68 in their certiorari opposition, that specific proposal is known as a "concept amendment," offered by the Rule 23 Subcommittee to the Advisory Committee. Indeed, the Rule 23 Subcommittee itself specifically states that its sketches do not mean that any changes will be made. RULE 23 SUBCOMM. REPORT at 2 (April 2015) ("**there is no assurance that the Subcommittee will ultimately recommend any amendments**"). As a result, there is no reason for this Court to defer its judgment on the use of Rule 68 to the Advisory Committee that may itself never issue a formal recommendation for any change.

II. The designation of a case in the pleadings as "class action" does not change the application of either Article III or the Federal Rules of Civil Procedure.

The FRCP are designed to be flexible, and to cover *all* situations that arise in litigation. This principle is embedded in the text of Rule 1, which states the Rules "govern the procedure in all civil actions and proceedings." Fed. R. Civ. P 1. By design, unless otherwise provided, no Federal Rule of Civil Procedure supersedes any other in operation. Rule 23 provides no exception to this basic principle. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010) ("A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others."). Indeed, the only permissible exceptions are specifically enumerated in Federal Rule 81, and class actions are not among them.

As a result, even in a class action, procedures under the other FRCP operate normally. Complaints are filed under Rule 8, and motions to dismiss are decided under Rule 12, with reference to Rules 8 and 9. *See, e.g., Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) (applying Rules 8(a)(2) and 12(b)(6) to antitrust class action); *Tellabs, Inc. v. Makor Issues & Rights Ltd.,* 551 U.S. 308, 320 (2007) (discussing application of Rules 8, 9, and 12 to securities class action).

Similarly, when determining whether summary judgment is appropriate in a class action, courts properly consult Rule 56. *See, e.g., Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 571 n.1 (8th Cir. 2015) ("Although a district court must determine whether to certify a class at 'an early practicable time' in the litigation, Rule 23(c)(1)(A), it is not uncommon for a district court to rule on a summary judgment motion that will clarify or simplify the litigation prior to ruling on class certification."); *Schweizer v. TransUnion Corp.*, 136 F.3d 233, 239 (2d Cir. 1998) ("'There is nothing in Rule 23 which precludes the court from examining the merits of plaintiff's claims on a proper Rule 56 motion for summary judgment simply because such a motion' precedes resolution of the issue of class certification.").

Likewise, the requirement of Article III standing applies at all stages of a lawsuit, regardless of how the case is originally designated. *See United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (Constitutional challenge to sex-offender registration statute lacked Article III standing); *Lewis v. Cont'l*

Bank Corp., 494 U.S. 472, 477-78 (1990) (Constitutional challenge to banking statute mooted by subsequent amendments).

The FRCP do not authorize courts to deviate from their normal procedure in order to preserve a class action when it would otherwise expire. *Shady Grove*, 559 U.S. at 410 ("compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications"). So long as each Rule is itself valid under the Rules Enabling Act, a court "must" apply it. *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987). This Court has stated that class actions are "exceptions" to the ordinary rule of individual litigation. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

However, any exceptional treatment occurs only in the context of a case that has been properly certified under Rule 23 as a class action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) ("a putative class acquires an independent legal status once it is certified under Rule 23."); *see also Sosna v. Iowa*, 419 U.S. 393, 403 (1975) ("A litigant must be a member of the class which he or she seeks to represent *at the time the class action is certified by the district court*.") (emphasis added); *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) ("Representative suits with preclusive effect on

nonparties include *properly conducted class actions*") (emphasis added).

This balance among the various Federal Rules, where each controls only when its application is required, is vital to our conception of the FRCP as a procedural tool. At its heart, the question of whether an outstanding settlement offer (whether expressed as a Rule 68 offer of judgment or simply as an offer of settlement) moots the claim of a named plaintiff in a class action is a question of when and how parties may settle a lawsuit. As this Court has consistently held, the presence of class allegations does not change the underlying individual character of a pre-certification class action.

Those holdings are entirely consistent with the limitations imposed by the Rules Enabling Act. Under the Act, the Advisory Committee's role is to identify improvements to procedure that have the support of a wide range of practitioners. But the Advisory Committee (and, by extension, the courts) cannot use the Rules to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). That limitation on the Federal Rules is a jurisdictional limitation. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001). The Federal Rules may change the *procedure* followed in a given case, but not the *substance* of the law that is applied. *Shady Grove*, 130 S.Ct. at 1442 (if a rule "governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not") (citation and internal quotation marks omitted).

The question currently before the Court is one of standing. *Symczyk*, 133 S. Ct. at 1528 (mootness is "corollary to [Article III's] case-or-controversy requirement"). Article III's case-or-controversy requirement is irrefutably substantive. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing elements "are not mere pleading requirements but rather an indispensable part of the plaintiffs case"). As a result, it constrains the application of Rule 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997); *see also* Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts."). In fact, the case-or-controversy requirement is a "bedrock requirement" of the Constitutional separation of powers, limiting the judicial power to situations where there is a live controversy in front of it, and leaving substantive lawmaking to the legislature. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Setting that requirement aside when a valid Rule 68 offer of judgment (or a similar settlement offer) would moot a favored class action violates the separation of powers reflected in Congress's delegation of the rulemaking function in the Rules Enabling Act. *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965) ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.").

In other words, the real question in this case is

whether it is more important to keep putative class actions alive after a settlement offer, or to maintain the settled understanding of the case-or-controversy requirement. Given the vital role that the case-or-controversy requirement plays in the separation of powers, and the orderly function of the federal courts, it is clear that styling a case as a "Class Action" cannot suspend the constitutional requirement that there be a live controversy at every stage of the litigation.

III. The Rule 23 Subcommittee's "conceptual sketches" should not serve as even persuasive authority for this Court's decision.

Just as this Court should not defer its judgment to the Advisory Committee, it also should not use the Rule 23 Subcommittee's current "conceptual sketch" as a model its ruling. The content of the current conceptual sketches would have the effect of altering this Court's recent rulings on the proper application of Rule 23, and push (if not trespass) the boundaries of the Rules Enabling Act.

For example, while this Court has ruled that the Rule 23 standard is "stringent" and "in practice exclude[s] most claims," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013), the Subcommittee's sketches include a new Rule 23(b)(4) that would streamline certification of settlement classes. RULE 23 SUBCOMM. REPORT at 8-16. The Subcommittee has specifically stated that such a rule would be "clearly contrary to" this Court's ruling in

Amchem Products Inc. Windsor, 521 U.S. 591 (1997). *Id.* at 13.

Similarly, despite this Court's ruling that Rule 23's predominance requirement is "demanding," *Behrend*, 133 S. Ct. 1426 at 1432, the Subcommittee's sketches contemplate amending Rule 23(b)(3) to ensure that a class action that is not otherwise certifiable may proceed as to a single issue. RULE 23 SUBCOMMITTEE REPORT at 29-31. Such an amendment would effectively eviscerate Rule 23's predominance requirement as it currently stands, even though this Court has made clear that the predominance requirement is necessary to ensure due process. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011).

The Subcommittee is also considering formally recognizing the role of *cy pres* relief in class settlements. RULE 23 SUBCOMM. REPORT at 17-22. The Subcommittee concedes that, as written, its draft raises "Enabling Act issues" because it "goes beyond what the Enabling Act allows a rule to do." *Id.* at 19 & n.36. It also recognizes that there is likely no statutory authority for *cy pres* relief. *Id.* at 18 n.33; *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §3.07 (2010). See generally, Martin H. Redish, Peter Julian, and Samantha Zyont, *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010). Nonetheless, it purports to offer a method of allocating class members' relief to a designated third party

The Subcommittee's treatment of offers of

judgment (or other early settlement offers, similar to the one that Petitioners made in this case) under Rule 23 is no different than these other ideas. It contemplates either (1) amending Rule 68 to render it inapplicable to class actions brought under Rule 23, or (2) amending Rule 23(e) to require judicial approval of any individual plaintiff settlements. RULE 23 SUBCOMM. REPORT at 26-29. These sketches, if adopted, would fly in the face of this Court's repeated, unanimous rulings that class actions are individual lawsuits until such time as they are certified for class treatment. *See Taylor*, 553 U.S. at 983; *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) (class action denied certification is not "properly conducted" class action); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013) ("a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified"). In fact, in 2003, the Advisory Committee amended Rule 23(e) to make clear that named-plaintiff-only settlements do *not* require court approval. FED R. CIV. P. 23(e)(1)(A), advisory committee's notes (2003).[2]

These sketches are designed to spark debate, and so they are deliberately provocative. This is a useful tactic: staking out an extreme position at the beginning of a long debate gives all sides something concrete for comment, and reduces wheel spinning.

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[2] While the ALI has suggested reinstating judicial oversight, its reason was to prevent plaintiffs from leveraging a class action designation in the complaint into a larger individual settlement. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.02, Reporters Notes, cmt. b.

But what makes these proposals useful in the context of a transparent, years-long process of building consensus around any possible changes is exactly what makes them ill-suited for reference in a currently pending controversy regarding application of the FRCP as written.

CONCLUSION

The Court should decide this case, rather than deferring—either formally or as a practical matter—to the Rules Enabling Act process. Because the FCRP are trans-substantive, Rule 68 applies to all cases, including those styled as class actions. Only the proper certification of a class under Rule 23 can change the character of a lawsuit from one prosecuted by an individual on her own behalf to one on behalf of persons not present before the court. It is for this reason that the Court should reverse the Circuit Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

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